

Petitioner Marvin Vermillion has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254. Respondent has filed a motion to dismiss, raising the statute of limitations as a bar to the Court's consideration of petitioner's petition. Petitioner has not filed a response to respondent's motion. The undersigned recommends that the petition be dismissed as untimely pursuant to 28 U.S.C. § 2244(d).

The facts in this case were summarized by the Washington Court of Appeals as follows:

The victim testified at trial that she was working in Seattle as a realtor in the summer of 1998. She used advertisements that included her photograph. Marvin Vermillion called her, identified himself as “Bill Bradley,” and said he was a federal prosecutor who was relocating from Chicago. The realtor arranged to meet him the following day. She picked up Vermillion at the Westin Hotel, drove him to her office to look at listings, and took him to view several properties.

The next day, they looked at more properties. Vermillion said he wanted to revisit a condominium in West Seattle he had seen the previous day. Inside the condominium, Vermillion called the realtor into the master bedroom and

1 suddenly started choking her. A struggle ensued. Vermillion punched the  
2 realtor, pushed his groin against her, and choked her into unconsciousness with  
his body lying on top of hers.

3 The realtor's car, her brief case, her credit cards, personal checks and  
4 other items were missing when she regained consciousness. Following  
Vermillion's arrest for an alleged bank robbery, the realtor identified him as her  
5 attacker from a photo montage.

6 The State went to trial against Vermillion on charges of one count each  
of assault, kidnapping, burglary and robbery in the first degree, with each count  
7 including an additional allegation of sexual motivation. A jury convicted  
Vermillion as charged. The court sentenced him, as a persistent offender, to life  
8 in prison without the possibility of parole.

9 (Dkt. No. 12, Ex. 2 at 1-2).

10 Petitioner appealed to the Washington Court of Appeals, which affirmed his conviction  
on April 21, 2003. (*Id.*, Ex. 2). Petitioner sought discretionary review by the Washington  
11 Supreme Court which denied review on February 4, 2004. (*Id.*, Ex. 4). While his direct appeal  
12 was pending, petitioner filed a personal restraint petition ("PRP"). The Washington Court of  
13 Appeals stayed the PRP until petitioner's direct appeal had been resolved. (*Id.*, Ex. 10). Once  
14 his direct appeal had concluded, the state court dismissed petitioner's PRP on December 8, 2005.  
15 (*Id.*, Ex. 11). On July 19, 2006, following denial of review by the Washington Supreme Court  
16 on March 8, 2006, (*Id.*, Ex. 14), the Washington Court of Appeals issued a Certificate of Finality  
17 regarding the PRP. (*Id.*, Ex. 15).

18 On July 15, 2007, the petitioner signed the instant petition for a writ of habeas corpus  
19 under 28 U.S.C. § 2254, (Dkt. No. 7) and under *Houston v. Lack*, 487 U.S. 266, 270 (1988), the  
20 petition is deemed to have been filed on that date. In screening the petition, the Court noticed  
21 that it may be untimely and directed petitioner to show cause why it should not be dismissed.  
22 (Dkt. No. 6). Petitioner responded to the Order to Show Cause and argued that the petition was  
23 timely because it had been filed within one year from the date of the Certificate of Finality,  
24 issued on July 19, 2006. (Dkt. No. 8 at 2). The Court accepted this argument on a preliminary  
25 basis only and directed respondent to file an answer. (Dkt. No. 9).

1 On November 5, 2007, respondent filed a motion to dismiss the petition as untimely.  
2 (Dkt. No. 12). Petitioner has not filed a response to the motion, and the matter is now ready for  
3 review.

#### 4 DISCUSSION

5 Petitions filed pursuant to 28 U.S.C. § 2254 are governed by the one-year statute of  
6 limitations provided in the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”).  
7 Under AEDPA, the one-year limitation period begins to run from the latest of four possible  
8 dates:

9 (A) *the date on which the judgment became final by the conclusion of direct*  
10 *review or the expiration of the time for seeking such review;*

11 (B) the date on which the impediment to filing an application created by State  
12 action in violation of the Constitution or laws of the United States is removed, if  
the applicant was prevented from filing by such State action;

13 (C) the date on which the constitutional right asserted was initially recognized by  
14 the Supreme Court, if the right has been newly recognized by the Supreme Court  
and made retroactively applicable to cases on collateral review; or

15 (D) the date on which the factual predicate of the claim or claims presented could  
have been discovered through the exercise of due diligence.

16 28 U.S.C. § 2244(d)(1) (emphasis added).

17 In addition, “a properly filed application for State post-conviction or other collateral  
18 review,” such as a PRP in Washington state, will toll the statute of limitations. 28 U.S.C. §  
19 2244(d)(2).

20 Here, petitioner’s direct appeal concluded when the Washington Supreme Court denied  
21 petitioner’s petition for discretionary review on February 4, 2004. (Dkt. No. 12, Ex. 4).  
22 However, on that date, petitioner’s PRP was still pending in the state court. As “a properly filed  
23 application for State post-conviction” relief, petitioner’s PRP tolled the statute of limitations  
24 until the Washington Supreme Court denied review on March 8, 2006. (*Id.*, Ex. 14). Thereafter  
25 the AEDPA statute of limitations expired on March 9, 2007. The instant petition was filed on  
26 July 15, 2007, approximately four months after the one-year period of limitations had expired.

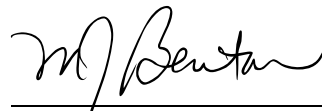
1 Although , petitioner argued in his response to the Court's Order to Show Cause that the  
2 statute of limitations was tolled running until the Washington Court of Appeals issued its  
3 Certificate of Finality on July 19, 2006, (Dkt. No. 12, Ex. 15), this argument is in error. "[I]t is  
4 the decision of the state appellate court, rather than the ministerial act of entry of the mandate,  
5 that signals the conclusion of review." *White v. Klitzkie*, 281 F.3d 920, 923 (2002). Here, the  
6 issuance of the Certificate of Finality, like the issuance of a mandate, is merely a ministerial act  
7 and it was the decision of the Washington Supreme Court denying review on March 8, 2006 that  
8 signaled the conclusion of direct review. *Id.*

9 Finally, the Court notes that neither petitioner's habeas petition nor his response to the  
10 Order to Show Cause reveals any extraordinary circumstances that might qualify him for  
11 equitable tolling of the statute of limitations. *See Espinoza-Matthews v. California*, 432 F.3d  
12 1021, 1026 (9<sup>th</sup> Cir. 2005). In sum, petitioner's federal habeas petition is untimely, and  
13 respondent's motion to dismiss the petition should be granted.

#### 14 CONCLUSION

15 For the foregoing reasons, petitioner's habeas petition is barred by the applicable statute  
16 of limitations and respondent's motion to dismiss should be granted. A proposed Order is  
17 attached.

18 DATED this 7<sup>th</sup> day of December, 2007.

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21 MONICA J. BENTON  
22 United States Magistrate Judge  
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